No. 84-2026

Office - Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS
CLERK

In the

Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

Eugene Issac Pitts ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

* JOHN STEVEN CLARK
Arkansas Attorney General

BY: JACK GILLEAN
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Petitioner
* *Counsel of Record*

QUESTIONS PRESENTED

I. WHETHER THE EIGHTH CIRCUIT ERRED IN FINDING THAT NO PROCEDURAL BAR EXISTED TO PRECLUDE ITS CONSIDERATION OF PITTS' SIXTH AND FOURTEENTH AMENDMENT CLAIMS.

II. WHETHER THE EIGHTH CIRCUIT ERRED IN FINDING THAT THE DEATH-QUALIFICATION OF PITTS' JURY VIOLATED THE SIXTH AMENDMENT REQUIREMENT OF A FAIR CROSS-SECTION OF THE COMMUNITY AND THAT SUCH JURIES ARE CONVICTION PRONE.

III. WHETHER THE EIGHTH CIRCUIT ERRED IN APPLYING *MABRY V. GRIGSBY* RETROACTIVELY TO PITTS' CASE.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S RULING THAT PITT'S *GRIGSBY* CLAIM WAS NOT PROCEDURALLY BARRED DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS 5

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S DECISION IN THIS CASE IS GROUNDED UPON ITS HOLDING IN *MABRY V. GRIGSBY* AND THAT CASE PRESENTS SIGNIFICANT REASONS FOR THIS COURT TO GRANT CERTIORARI 6

III. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE EIGHTH CIRCUIT HAS IMPROPERLY INTERPRETED THIS COURT'S DECISIONS IN APPLYING *MABRY V. GRIGSBY* RETROACTIVELY 9

CONCLUSION 11

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

CASES: Page

Engle v. Isaac, 456 U.S. 107 (1982) 5

Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983) 3, 5

Hendrickson v. State, No. CR 84-164 (Ark. April 29, 1985) 8

Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984) 7

Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), *petition for cert. filed*, ____ U.S. L.W. ____ (U.S. Feb. 2, 1985) (No. 84-6187) 7

McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985) 7

Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985) 4, 5

Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985), *petition for cert. filed sub nom. Lockhart v. McCree*, ____ U.S. L.W. ____ (U.S. May 29, 1985) (No. 84-1865) 7

Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983) 6

Pitts v. Lockhart, No. PB-C-82-92 (E.D. Ark. Feb. 8, 1983) 1

Pitts v. Lockhart, No. PB-C-82-92 (E.D. Ark. Sept. 20, 1983) 1

Pitts v. Lockhart, 753 F.2d 689 (8th Cir. 1985) 1, 3, 4, 5, 9

Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983) 8

Ruiz v. Lockhart, 754 F.2d 254 (8th Cir. 1985) 4, 7, 9

Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982) 8

Solem v. Stumes, 104 S.Ct. 1338 (1984) 10

Spinkellink v. Wainwright, 578 F.2d 582, (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) 8

Wainwright v. Sykes, 433 U.S. 72 (1977) 5

Wainwright v. Witt, 105 S.Ct. 844 (1985) 8, 10

Witherspoon v. Illinois, 391 U.S. 510 (1968) 7, 10

Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985) 4, 6, 7, 9, 10

STATUTES:

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 2254 3

CONSTITUTIONAL PROVISIONS:

Sixth Amendment 2

Fourteenth Amendment 2

No. ____

In the
Supreme Court of the United States

October Term, 1984

A. L. Lockhart, Director,
Arkansas Department of Correction ..... *Petitioner*

V.

Eugene Issac Pitts ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

A. L. Lockhart, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Pitts v. Lockhart*, 753 F.2d 689 (8th Cir. 1985) and is reprinted as Appendix A to this petition. The decision of the District Court was issued in two separate opinions both of which are unpublished. The first opinion, *Pitts v. Lockhart*, No. PB-C-82-92 (E.D. Ark. Feb. 8, 1983), is reprinted in slip opinion form as Appendix B to this petition. The second opinion, *Pitts v. Lockhart*, No. PB-C-82-92 (E.D. Ark. Sept. 20, 1983), is reprinted in slip opinion form as Appendix C to this petition. The judgment of the District Court is reprinted as Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1985. A petition for rehearing was not filed. On April 10, 1985, Justice Harry A. Blackmun entered an order extending the time for filing a petition for a writ of certiorari in this case to and including June 29, 1985. The jurisdiction of this Court is involed under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 1982, the United States District Court for the Eastern District of Arkansas properly assumed jurisdiction of this habeas corpus action pursuant to 28 U.S.C. §2254.

In 1979, Pitts was convicted of capital felony murder and was sentenced to life imprisonment without parole. He was tried by a "death-qualified" jury from which all persons who refused to consider the death penalty had been excluded.

In the habeas petition filed in the District Court, Pitts claimed among other things that his Sixth and Fourteenth Amendment rights to a trial by a fair and impartial jury had been violated and that such jury was materially prejudiced. Pitts raised eight issues to the District Court. All of the issues raised by him were ultimately resolved against him by the court when his habeas petition was denied. The District Court denied seven of the eight issues raised by Pitts in its Memorandum Opinion issued on February 8, 1983. (See Apendix B). The eighth issue was held in abeyance by the court pending resolution of *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark. 1983). After *Grigsby* was decided, the court denied Pitts' Sixth and Fourteenth Amendment claims in its Memorandum and Order issued on September 20, 1983. (See Exhibit C). In rejecting the Sixth and Fourteenth Amendment claims, the court held that the issue was barred from consideration in a federal habeas proceeding because even though a timely objection had been made, Pitts had not "made an offer of proof by evidence that death-qualified juries would not be representative or that they would be guilt prone." *Pitts v. Lockhart*, Appendix C at C-2.

The Eighth Circuit reversed the District Court and ordered that the writ of habeas corpus be granted unless the state retries Pitts. *Pitts v. Lockhart*, 753 F.2d 689, 691 (8th Cir. 1985). The court held that Pitts' Sixth Amendment

claim was governed by its opinion in *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985) decided the previous day, and by *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985) and *Ruiz v. Lockhart*, 754 F.2d 254 (8th Cir. 1985), decided the same day. *Pitts* at 691. In *Grigsby*, the court held that "death -qualified" juries are not fairly representative of the community and are not impartial on the question of guilt or innocence. In *Woodard*, the court held that since the *Grigsby* rule directly affected the truth-finding function of the jury, it is to be applied retroactively to cases that were tried before *Grigsby* was handed down. The court relied directly on *Grigsby* and *Woodard* in deciding *Ruiz*.

The court also held that no procedural bar existed to prevent it from reaching Pitts' Sixth Amendment claim. The Eighth Circuit disagreed with the District Court on this issue and held that, because Pitts had raised the issue before the trial court and because *Grigsby* had held that a death-qualified jury violated both the Sixth and Fourteenth Amendments *per se*, no evidentiary showing of unrepresentativeness or guilt proneness was required to preserve the issue for federal review. *Pitts* at 690-91.

The Eighth Circuit has stayed its order that Pitts be retried or released pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S RULING THAT PITTS' *GRIGSBY* CLAIM WAS NOT PROCEDURALLY BARRED DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Eighth Circuit held that Pitts's claim, pursuant to *Grigsby v. Mabry*, 569 F.Supp. 1273 (E.D. Ark. 1983), that the death-qualification of his jury violated the Sixth Amendment's requirement of a fair cross-section of the community and that such juries are conviction prone, was not barred from consideration by a federal court on habeas corpus review. The court reversed the District Court on this issue. The District Court had held that the issue was barred because Pitts had not made an offer of proof that his death-qualified jury was unrepresentative of the community or that they were guilt prone. *Pitts*, Appendix C at C-2. The Eighth Circuit found that because Pitts had raised the issue before the trial court and because *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985), had held that a death-qualified jury violated both the Sixth and Fourteenth Amendment *per se*, no evidentiary showing of unrepresentativeness or guilt proneness was required to preserve the issue for federal habeas review. *Pitts* at 690-91.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977) and *Englev. Isaac*, 456 U.S. 107 (1982), this Court recognized that a defendant who failed to raise an issue in violation of a state rule of procedure requiring a timely objection, so that the issue was never disposed of on its merits by the state court, could not thereafter have the issue determined in a federal habeas corpus proceeding unless he established "cause" for the failure to raise the matter properly and "actual prejudice" as a result of the default.

Although the State acknowledges that Pitts raised the issue of the Sixth and Fourteenth Amendment violations before the trial court, he did not make an offer of proof in support of his claims. Thus, how can it be said that the state courts have ruled on the merits of this issue under *Wainwright v. Sykes* and *Engle v. Isaac* when there was no record upon which the courts could have reviewed the merits of the issue.

The Eighth Circuit's ruling in Pitts contradicts its own prior holding in *Pickens v. Lockhart*, 714 F.2d 1455, 1458 n.2 (8th Cir. 1983). In *Pickens*, the Eighth Circuit held that a habeas petitioner is barred from raising this issue in the federal courts when he has not raised it timely in the state courts, when he makes no effort to introduce evidence on the issue and when he does not object to the composition of the jury. As such, the State contends that the Eighth Circuit finding that there was no procedural bar in Pitts' case is erroneous and that Pitts must be required to establish cause and prejudice before the federal court may review his Sixth Amendment claim. The Eighth Circuit recognized that this issue is subject to cause and prejudice analysis upon a finding of a procedural default. *Woodard*, 753 F.2d at 698 n. 2.

Irrespective of how this Court should ultimately decide the substantive issue raised in *Grigsby*, it is crucial that the procedural bar issue raised in this case be clarified by this Court because the lower court's holding will affect procedural bar issues in many future habeas cases and not just cases raising the *Grigsby* issue.

II.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S DECISION IN THIS CASE IS GROUNDED UPON ITS HOLDING IN *MABRY V. GRIGSBY* AND THAT CASE PRESENTS SIGNIFICANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

The Eighth Circuit decided Pitts' case on the basis of its holdings in *Mabry v. Grigsby*, 758 F.2d 226 (8th Cir. 1985), *petition for cert. filed sub nom Lockhart v. McCree*, ____ U.S.L.W. ____ (U.S. May 29, 1985) (No. 84-1865); *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985) (petition for cert. being filed contemporaneously with this petition); and *Ruiz v. Lockhart*, 754 F.2d 254 (8th Cir. 1985) (petition for cert. being filed contemporaneously with this petition). The identical issue is also pending before this Court in *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Feb. 2, 1985) (No. 84-6187).

In *Grigsby*, the Eighth Circuit found that a capital jury with *Witherspoon*-excludables stricken for cause, is conviction prone and, therefore, does not constitute a cross-sectional representation in a given community. The court held Arkansas' method of jury selection in capital murder cases to be unconstitutional under the Sixth Amendment. The Eighth Circuit was addressing the question left open in *Witherspoon v. Illinois*, 391 U.S. 510, 520 n. 18 (1968): whether a "death-qualified" jury i.e. a jury with those persons stricken for cause who state a *voir dire* that they would refuse to consider capital punishment, is "less than neutral with respect to *guilt*." (Emphasis original.)

In *Woodard*, the Eighth Circuit held that since the *Grigsby* rule directly affected the jury's truth-finding function it would apply retroactively to cases which had been tried before *Grigsby* was handed down. *Grigsby* and *Woodard* were followed in *Ruiz*.

Thus, the issue in *Grigsby*, and consequently in *Woodard*, *Ruiz* and in Pitts' case, presents significant justification for this Court's review. As was noted in the petition for certiorari in *Lockhart v. McCree*, the Eighth Circuit's opinion in *Grigsby* has created a conflict among the federal circuit courts of appeals. *See McClesky v. Kemp*, 753 F.2d 877, 901 (11th Cir. 1985); *Keeten v. Garrison*, 742

F.2d 129, 134 (4th Cir. 1984); *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981), *modified*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 593-95 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). The *Grigsby* decision is in direct conflict with decisions of the Arkansas Supreme Court. *Hendrickson v. State*, No. CR 84-164 (Ark. April 29, 1985); *Rector v. State*, 280 Ark. 385, 659 S.W.2d 168 (1983).

Also, the Eighth Circuit's opinion in *Grigsby* incorrectly applied the decisions of this Court in holding that there was a cross-section violation by the exclusion of *Witherspoon*-excludables at *voir dire*, in applying cross-section analysis to petit juries, and in finding *Witherspoon*-excludables to be a cognizable group subject to cross-section analysis.

The Eighth Circuit also erred in failing to recognize the State's legitimate interest in excluding *Witherspoon*-excludables, a right clearly acknowledged by this Court. *Wainwright v. Witt*, 105 S.Ct. 844 (1985). Finally, the Eighth Circuit improperly relied on evidence in the form of social science studies and surveys in concluding that "death-qualified" juries are conviction prone.

Because the disposition of this portion of this petition is dependent upon the Court's disposition of the petitions in *McCree* and/or *Keeten*, the petitioner asks that this portion of this petition be held until final disposition of one or both of the above named cases or that it be consolidated therewith on this issue.

The issue to be raised subsequently in this petition will either become moot by the Court's disposition of *McCree* and/or *Keeten* or will need to be resolved because of the Court's decision in one or both of those cases.

III.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE THE EIGHTH CIRCUIT HAS IMPROPERLY INTERPRETED THIS COURT'S DECISIONS IN APPLYING *MABRY V. GRIGSBY* RETROACTIVELY.

After its ruling in *Grigsby*, the Eighth Circuit was immediately faced with whether to apply the ruling retroactively in *Woodard*. The court relied on decisions of this Court to hold that *Grigsby* should be afforded "fully retroactive application." *Woodard*, 753 F.2d at 697. In accordance with *Woodard*, *Grigsby* was applied retroactively in *Ruiz*, 754 F.2d at 256. And, *Grigsby* was applied retroactively in this case pursuant to *Woodard* and *Ruiz*. *Pitts*, 753 F.2d at 691.

The Eighth Circuit relied heavily on the retroactivity analysis of *Witherspoon* finding it to be "virtually on all fours" with these cases. *Woodard*, 753 F.2d at 696. In *Witherspoon* this Court held in essence that the exclusion of those persons from a capital murder jury with conscientious scruples against the death penalty resulted in a jury that was partial on the issue of *punishment*. The Eighth Circuit has now held in *Grigsby* that the exclusion of those persons from a capital murder jury who would refuse to consider the death penalty results in a jury that is partial on the issue of *guilt-innocence*. Although the Eighth Circuit stated that its holding in *Grigsby* was foreshadowed in *Witherspoon*, the holdings are markedly different and *Grigsby* does not necessarily follow from *Witherspoon*.

Grigsby identified the three factors that must be considered in applying a judicial decision retroactively: (a) the purpose to be served by the new rule; (b) the extent to which law-enforcement authorities have relied on an older rule of law, and (c) the effect on the administration of justice of a retroactive application of the new rule. *Woodard* 753

F.2d at 695, *citing Solem v. Stumes*, 104 S.Ct. 1338, 1341 (1984). This Court had utilized the same factors in *Witherspoon*. *Id.*, 391 U.S. at 523 n. 22.

The Eighth Circuit stated that, "we see no relevant difference between these two rules [*Witherspoon* and *Grigsby*] for purposes of the Supreme Court's retroactivity criteria." *Woodard*, 753 F.2d at 696. However, the court seemingly ignored a major distinction between *Witherspoon* and *Grigsby*. *Witherspoon* invalidated only the sentence in that case. *Grigsby* has the effect of invalidating the conviction. Those inmates successfully raising the *Grigsby* issue must be retried or set free. The State asserts that *Grigsby* would have a significantly greater impact on the administration of justice, if upheld and applied retroactively, than did *Witherspoon*.

Aditionally, the Eighth Circuit states that it "doubt[s] that law-enforcement officials are markedly more surprised by *Grigsby* . . . than they were by *Witherspoon* . . . ." *Woodard*, 753 F.2d at 696. The State strongly disagrees with this statement. From *Witherspoon* through *Wainwright v. Witt*, 105 S.Ct. 844 (1985), this Court has consistently approved of the *Witherspoon* process of excluding those persons from capital murder juries who state that they will not consider the death penalty. Prosecutors in Arkansas (and across this country) have strongly relied on the rule of law which existed prior to *Grigsby* (and still exists in every other federal circuit).

The State asserts that the effect on the administration of justice of *Grigsby's* new rule and the extent of the reliance on the rule followed prior to *Grigsby* would strongly outweigh its retroactive application to this case, if *Grigsby* is upheld.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

* JOHN STEVEN CLARK
Arkansas Attorney General

BY: JACK GILLEAN
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

Counsel for Petitioner
* *Counsel of Record*

APPENDIX A

Eugene Issac PITTS, Appellant,

v.

A. L. LOCKHART, Director, Arkansas Department of Correction, Appellee.

No. 83-2433-EA.

United States Court of Appeals, Eighth Circuit.

Submitted May 15, 1984.
Decided Jan. 31, 1985.

Charles T. Coleman, Little Rock, Ark., for appellant.

Steve Clark, Atty. Gen. by Randel Miller, Asst. Atty. Gen., Little Rock, Ark., for appellee.

Before McMILLIAN, BENNETT* and ARNOLD, Circuit Judges.

BENNETT, Circuit Judge.

Eugene Issac Pitts appeals the district court's final judgment, No. PB-C-82-92 (E.D. Ark. September 20, 1983) (unpublished), denying his petition for a writ of habeas corpus under 28 U.S.C. §2254 (1982). Mr. Pitts, a state prisoner in Arkansas, was convicted by a jury on July 13, 1979, of capital felony murder and kidnapping. The victim was Dr. Bernard Jones, a North Little Rock, Arkansas,

---

*The Hon. Marion T. Bennett, United States Circuit Judge for the Federal Circuit, sitting by designation.

veterinarian. He was kidnapped from his home, bound, gagged, transported in his own vehicle, and found the next day shot four times in the head. Mr. Pitts was sentenced to life imprisonment without parole. His conviction was affirmed by the Arkansas Supreme Court. *Pitts v. State*, 273 Ark. 220, 617 S.W.2d 849 (1981). The Arkansas Supreme Court thereafter considered a petition filed to seek post-conviction relief under Arkansas Rule of Criminal Procedure 37. The petition was denied on February 2, 1982, in a per curiam opinion not designated for publication. In the petition, Pitts raised eight grounds for relief which he later advanced to the district court in his application for a writ of habeas corpus. [1]

Before the district court, Pitts particularized his first alleged ground for relief as the denial of a fair trial in violation of his sixth and fourteenth amendment rights. His contention then and now is that the jury was unconstitutionally "death-qualified" and thus was not a representative cross-section of the community, and that it was "guilt prone" and therefore not impartial. The district court first discussed and then dismissed the seven other alleged grounds on the merits and for lack of constitutional blemish. Upon consideration of the record, briefs, and oral argument, we think that the district court was right on those seven issues and affirm its resolution of them upon the basis of the discussion in its opinion. No. PB-C-82-92 (E.D. Ark. February 7, 1983).

1

The grounds as summarized by the district court are: (1) the right to a trial by a fair and impartial jury was violated; (2) the trial court erred in admitting testimony relating to some guns not connected with the charged offense; (3) he was denied due process in that he was not allowed funds to hire an expert witness; (4) the trial court erred in admitting certain tape recordings without proper foundation and authentication; (5) he was denied the effective assistance of counsel; (6) the conviction was obtained as a result of improper police tactics in obtaining handwriting samples; (7) the trial court erred in limiting the cross-examination of a witness and in restricting the testimony of a defense witness; and (8) the evidence was insufficient to support the guilty verdict.

[1] As to the first issue, the district court noted that it was under submission in another case before another judge in the same division. He therefore held that point in abeyance, with petitioner's consent, pending decision in *Grigsby v. Mabry*, now reported at 569 F.Supp. 1273 (E.D. Ark. August 5, 1983). In *Grigsby* it was held that a so-called "death-qualified jury," from which all persons who refused to consider the death penalty had been excluded, violated the sixth amendment right to a jury selected from a representative cross-section of the community, and the fourteenth amendment due process right to have an impartial jury. This view was reiterated in another opinion on August 18, 1983, when the court in *Grigsby* granted a stay pending appeal. 583 F.Supp. 629 (E.D. Ark. August 18, 1983).

Upon issuance of the *Grigsby* opinions, the district court in the present case considered the one issue it had reserved when dismissing all others on February 7, 1983. In an unpublished memorandum and order on September 20, 1983, the court held that in order to raise the death qualification issue properly, a petitioner must not only have made a timely objection, but he must also have made an "offer to prove by evidence that death-qualified juries would not be representative or that they would be guilt-prone." *Grigsby*, 583 F.Supp. at 630 n. 3. The court then held that since only the objection was made, but without an offer of the type mentioned above, petitioner had failed to raise the death qualification issue properly and was barred from doing so before the district court in the pending habeas proceeding. Respectfully, the court misread the note in *Grigsby* where that court, in note 3, expressed approval of the "view that a *per se* rule should be adopted even in the absence of the evidentiary showing invited in *Witherspoon*." *Id.*

Grigsby v. Mabry was the subject of in banc consideration by this circuit and the decision of the district court, 569 F.Supp. 1273, was affirmed. ____ F.2d ____ (No.

83-2113, 8th Cir. January 30, 1985)). It was held that a death-qualified jury violated both the sixth and fourteenth amendments per se. Reversal of the district court in the instant case is thus required. The circuit court decision has extended the doctrine in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), to decide an issue not resolved in that case, namely, that a jury from which persons were excluded because of conscientious scruples against the death penalty, made that jury less than impartial on the question of guilt or innocence. Unless reversed by higher authority, that is now the law of this circuit.

[2] The question remains as to whether in this appeal the circuit ruling in *Grigsby*, ____ F.2d ___, No. 83-2113, should be made retroactive. That question has been answered in the affirmative by the decision in *Woodard v. Sargent*, 753 F.2d 694 (8th Cir. 1985). The opinion in that case made a thorough, careful analysis of the relevant precedents and concluded that retroactivity is required, on a balancing of the interests of justice and the exigencies of the situation, because the *Grigsby* rule directly affects the truth-finding function of the jury. We agree. *See also Ruiz & Van Denton v. Lockhart*, ____ F.2d ____ (No. 83-2319, 8th Cir. January 31, 1985). It matters not at all, therefore, that Pitts did not receive the death penalty as did Woodard, Ruiz, and Van Denton. Pitts is entitled to relief because he was not constitutionally tried, convicted, and imprisoned.

The judgment of the district court in dismissal of the issues ruled on in its memorandum opinion of February 7, 1983, is affirmed. Its judgment of September 20, 1983, which denied the application for a writ of habeas corpus, is reversed. The case is remanded with directions to grant the writ unless the state, within such reasonable time as the district court may determine, commences proceedings to retry Pitts before a validly selected jury.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EUGENE ISAAC PITTS — PETITIONER

V. — CASE NO. PB-C-82-92

A. L. LOCKHART, Director
Arkansas Department of Correction — RESPONDENT

MEMORANDUM OPINION

The Court has received a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 from Eugene Isaac Pitts, an inmate at the Cummins Unit of the Arkansas Department of Correction. In support of the relief sought, petitioner raises the following grounds: (1) his right to a trial by a fair and impartial jury was violated; (2) the trial court erred in admitting testimony relating to some guns not connected with the charged offense; (3) denial of due process in that he was not allowed funds to hire an expert witness; (4) the trial court erred in admitting certain tape recordings without proper foundation and authentication; (5) denial of the effective assistance of counsel; (6) the conviction was obtained as a result of improper police tactics in obtaining handwriting samples; (7) the trial court erred in limiting the cross-examination of a witness and in restricting the testimony of a defense witness; and (8) the evidence was insufficient to support the guilty verdict. Respondent moves that the petition be dismissed without an evidentiary hearing.

On March 13, 1979, petitioner was charged by felony information with capital felony murder and kidnapping in connection with the shooting death of Dr. Bernard Jones, a North Little Rock, Arkansas, veterinarian. The evidence

indicates that on the evening of January 22, 1979, the victim's wife returned to their home after work and was met at the door by a masked gunman. He had apparently subdued her husband and, subsequently, he bound and gagged her. After a short period of time, the intruder and the victim left the house and Mrs. Jones was able to crawl next door and obtain help. The police were called and investigated what was thought to be a kidnapping and robbery. The next morning, Dr. Jones' body was discovered in the front seat of his Toyota Land Cruiser. He was bound and gagged and had been shot four times in the head. Items reported missing from the home the night before were also discovered in the back of the vehicle.

At the time, Mrs. Jones implicated petitioner as the perpetrator of the crime. She had known petitioner in law school some years before and he had recently made contact with her by telephone and in other ways. She testified that she believed that petitioner was the person who invaded her home and that she was able to identify him at the time even though most of his face was covered. There was a great deal of conflicting testimony concerning certain aspects of the crime and who was responsible for its commission.

Following a trial by jury in the Pulaski County Circuit Court, which concluded on July 13, 1979, petitioner was convicted as charged and was sentenced to life imprisonment without parole. His conviction was affirmed by the Arkansas Supreme Court on June 29, 1981. *Pitts v. State*, 273 Ark. 220, 617 S.W.2d 849 (1981). On that appeal, petitioner challenged the trial court's rulings concerning the admissibility of certain evidence as well as the sufficiency of the evidence. Petitioner subsequently sought post-conviction relief by requesting permission to proceed under Rule 37 of the Arkansas Rules of Criminal Procedure. In the petition, he raised the same eight grounds he presents to this Court; the Arkansas Supreme Court, after reviewing the issues raised, denied the request in a *per*

curiam opinion delivered on February 2, 1982, but not designated for publication. Petitioner then filed this habeas corpus petition, and it appears that he has met the exhaustion requirements of 28 U.S.C. §2254(b).

Petitioner first argues that he was not tried by a fair and impartial jury. He contends that the jury was "death-qualified" and that it was not, therefore, comprised of a representative cross-section of the community and was "guilt-prone." Respondent submits that this issue has yet to be recognized by the courts. This same issue was raised by a petitioner in the case of *Grigsby v. Mabry*, No. PB-C-78-32, currently under advisement in the District Court of the Honorable G. Thomas Eisele. It is this Court's intention to hold consideration of this question in abeyance pending the Court's decision in the *Grigsby* case, and petitioner has announced that he is not opposed to this course of action.

In three of the issues raised by petitioner, he challenges the propriety of certain trial court rulings concerning the admissibility of evidence. During the course of the trial, one of the prosecution's witnesses was allowed to read from a return on a search warrant a list of guns seized pursuant to an authorized search of petitioner's residence. He contends that this was materially and substantially prejudicial because none of the guns mentioned were connected with the crime. Petitioner also argues that it was improper for the trial court to admit into evidence a tape recording of a telephone conversation between petitioner and the victim's wife. He maintains that no proper foundation for admitting the tape had been laid, that its authenticity had been strenuously challenged, and that the trial court admitted it in violation of the Arkansas Uniform Rules of Evidence. He states that the admission of the tape had the effect of relieving the state of its burden of establishing authenticity and originality in additon to materially prejudicing his position. Finally, petitioner asserts that the trial court erred in refusing to allow him to cross-examine the state medical examiner concerning

possible evidence of homosexual activity just prior to the victim's death. He further contends that a defense witness was unduly restricted in testifying as to his expert opinion concerning the manner and cause of death based upon his examination and findings.

With respect to the admission of the testimony relating to the guns discovered at petitioner's residence, the respondent asserts that consideration of this issue is precluded because of the absence of a contemporaneous objection. *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Arkansas Supreme Court dealt with this allegation in the context of petitioner's claim of ineffective assistance of counsel and, after noting that no timely objection had been made, determined that petitioner had failed to demonstrate that his constitutional rights had been violated by either the alleged ineffective assistance of counsel or by the mere fact that the jury heard the testimony. While it is not disputed that a timely objection to the questioned testimony was not made, the rule announced in *Wainwright* requires federal courts to observe state procedural bars only where the state court itself relied on them to dismiss or dispose of the asserted claim. *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Euell v. Wyrick*, 675 F.2d 1007 (8th Cir. 1982). In the present instance, it does not appear that the Arkansas court based its dismissal of this matter on petitioner's failure to object at trial. Rather, it seems that the dismissal resulted from a consideration of petitioner's allegation on its merits and a finding that he had failed to establish his claim. In reviewing the allegation, this Court finds it must agree with the Arkansas court and that petitioner has failed to demonstrate that constitutional error occurred when the testimony was admitted.

Petitioner's arguments that the admission of the tape-recorded telephone conversation was improper and resulted in a denial of equal protection and due process are without merit. The admissibility of evidence is usually a matter of state law and does not involve federal

constitutional issues unless the alleged error infringes upon a specific constitutional right or is so prejudicial as to amount to a denial of due process. *Arnold v. Wyrick*, 646 F.2d 1225 (8th Cir. 1981); *Davis v. Campbell*, 608 F.2d 317 (8th Cir. 1979); *Nelson v. Hutton*, 597 F.2d 137 (8th Cir. 1979). A petitioner cannot succeed in a habeas corpus challenge to the admissibility of evidence by simply labeling the alleged violation as being an infringement upon his right to due process or equal protection. In this case, petitioner's counsel vigorously challenged the admissibility of the tape on the grounds of authenticity, that it had been altered, and that it was not made in the manner as alleged by the supporting witness. It was petitioner's counsel who played portions of the tape during the trial in order to attempt to show that the tape had been altered, and also to indirectly attack the credibility of Mrs. Jones. Under the totality of the circumstances surrounding the admission of the tape recording, this Court cannot say that the trial court erred in admitting the tape, and, certainly, no error of constitutional magnitude occurred.

Petitioner's allegations that his cross-examination of the state medical examiner was improperly limited and that he was prevented from eliciting certain testimony from an expert witness are also without merit. As before, these questions involve the admissibility of evidence, which does not usually present an issue of constitutional significance. At trial, petitioner's counsel sought to question the medical examiner about the presence of semen in the victim's rectum in an attempt to establish the possibility of homosexual activity immediately before his death. The trial court ruled that this line of questioning was improper, as did the Arkansas Supreme Court, because the medical examiner had stated that the finding of semen in that area was of no consequence in view of the fact that spontaneous postmortem ejaculation was common in traumatic deaths and that further tests were inconclusive. It cannot be said that the trial court committed constitutional error in determining that allowing this line of questioning would

involve a danger of unfair prejudice outweighing any probative value. Uniform Rules of Evidence, Rule 403, Ark. Stat. Ann. § 28-1001 (Repl. 1979). Likewise, no error was committed when the trial court refused to permit defense counsel from eliciting an opinion from its witness relating to the manner in which the victim was killed. Petitioner argues that it should have been permissible for the "expert" witness to have so testified. However the trial court expressly found that the witness, a private investigator, was not qualified to testify as an expert and could only have offered his opinion based on hearsay. As such, it was well within the trial court's discretionary power to refuse to admit the testimony.

Petitioner next asserts that during the course of the investigation into the crime, he voluntarily submitted handwriting samples and that the procedure which was followed was improper, rendering the results of the comparisons unreliable. He maintains that the officer requesting the exemplars gave him words to copy rather than dictating the words. In considering this allegation in petitioner's Rule 37 application, the Arkansas Supreme Court determined that he failed to establish the coercive aspects of the procedure, that he did not show how he was prejudiced, and that no fundamental constitutional issue was raised. Again, this Court adopts the reasoning of the Arkansas court. Petitioner admits he voluntarily submitted the samples, which precludes a finding of coercion. Saying he was prejudiced, without more, is totally insufficient to establish a constitutional violation. Petitioner's contention that the exemplar is unreliable is entirely unsubstantiated, especially in light of the fact that there is no allegation that the samples were not his.

Petitioner alleges that he was denied the effective assistance of counsel at trial and on appeal. In support of his claim, he offers several instances in which he contends counsel failed to adequately defend his interests. Petitioner argues that counsel failed to object to the admission of

testimony concerning the guns seized at his residence, that he failed to obtain the necessary expert witnesses, that he erroneously waived the proper foundational requirements for admission of the tape recording, and that counsel on appeal failed to properly abstract and brief all objections on appeal.

In order to prevail on an ineffective assistance of counsel claim, the petitioner must show that the attorney failed to exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *Ford v. Parratt*, 638 F.2d 1115 (8th Cir. 1981); *Dupree v. United States*, 606 F.2d 829 (8th Cir. 1979) (per curiam), *cert. denied*, 445 U.S. 919 (1980); *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976); *cert. denied*, 434 U.S. 844 (1977). There exists a presumption that counsel has rendered effective assistance. *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981); *Thomas v. Wyrick*, 535 F.2d 407 (8th Cir.), *cert. denied*, 429 U.S. 868 (1976). To overcome this presumption, petitioner must show that: (1) there was a failure to perform an essential duty owed by the defense attorney to his client; and (2) the failure prejudiced the defense. *Hawkman v. Parratt, supra; Ford v. Parratt, supra; McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974). Decisions relating to a reasoned choice of trial strategy and tactics are generally not cognizable in a federal habeas corpus proceeding. *Cox v. Wyrick*, 642 F.2d 222 (8th Cir.), *cert. denied*, 451 U.S. 1021 (1981); *Drake v. Wyrick*, 640 F.2d 912 (8th Cir. 1981); *United States v. Hagar*, 505 F.2d 737 (8th Cir. 1974).

As previouusly stated, petitioner has failed in his attempt to demonstrate that the testimony concerning the guns was erroneously admitted; therefore, counsel's failure to object cannot form the basis for a finding of ineffectiveness. Similarly, the decision not to require the state to lay a foundation for admission of the tape is not sufficient to find that trial counsel acted improperly. It

appears that there were tactical reasons for not forcing the state to jump the procedural hurdles, and the record indicates that, if forced, the state would have been able to do so. Instead, trial counsel chose to attack the authenticity of the tape and to attempt to establish at least the possibility that it had been altered. Petitioner's allegations concerning the acquisition of the services of expert witnesses are patently frivolous and merit no further consideration except to say that petitioner was provided with a tape expert, a geologist, and a private investigator, all of his own choosing. The Arkansas Supreme Court determined that petitioner's appellate counsel properly abstracted and briefed the record on appeal, and, in view of that finding, this Court deems the allegation of ineffective assistance of counsel on appeal to be without substance. *See, Sumner v. Mata*, 449 U.S. 539 (1981).

Lastly, petitioner argues that there was insufficient evidence to support the guilty verdict. The standard that federal courts apply when reviewing an allegation of insufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 319. In reviewing the record in this case, it is not this Court's task to substitute its judgment for that of the trier of fact, but only to apply the standard as set out above. In so doing, this Court finds that petitioner's claim is without support. The evidence which was developed during the course of the trial was complicated and, on many points, conflicting. The defense did an admirable job in attempting to focus the attention of the jury on its theory of the crime and on the weak areas of the prosecution's case. However, the jury, as the ultimate trier of fact, was charged with the responsibility of assessing the

credibility of the testimony and the relative weight to be assigned to each piece of evidence. It does not appear that their burdensome chore was imprudently discharged.

THEREFORE, with the exception of petitioner's claim pertaining to the death-qualified jury, the issues set forth herein will be dismissed. The ultimate disposition of the petition will be held in abeyance as set out above.

DATED this ____ day of 8 FEB 1983.

/s/William R. Overton
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EUGENE ISAAC PITTS — PETITIONER

V. — CASE NO. PB-C-82-92

A. L. LOCKHART, Director
Arkansas Department of Correction — RESPONDENT

MEMORANDUM AND ORDER

The Court has received a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 from Eugene Isaac Pitts, an inmate confined at the Cummins Unit of the Arkansas Department of Correction. [1] Petitioner filed his petition on April 1, 1982, raising eight separate grounds for relief, including a claim that his right to a trial by a fair and impartial jury was violated. It was his contention that the jury to which his case was tried was "death-qualified" and that it was not, therefore, comprised of a representative cross-section of the community and was "guilt-prone." In a Memorandum Opinion issued on February 7, 1983, the District Court announced its intention to hold consideration of this question in abeyance pending the District Court's decision in *Grigsby v. Mabry*, No. PB-C-78-32, which was under advisement in the Court of the Honorable G. Thomas Eisele. AT the same time, this Court considered the remainder of petitioner's allegations and, finding none of them to be sufficient to warrant granting habeas relief, dismissed the petition as to those issues.

---

1 Petitioner was convicted in the Pulaski County Circuit Court of capital felony murder in connection with the shooting death of Dr. Bernard Jones, a North Little Rock, Arkansas, veterinarian. He was sentenced to life imprisonment without parole.

On August 5, 1983, the District Court delivered its decision in the *Grigsby*, case and held that "if prospective jurors in capital cases are barred over the defendant's objection from jury service because of their views on capital punishment on any broader basis than inability to follow the law or abide by their oaths, the guilty verdict must be set aside." *Grigsby v. Mabry*, No. PB-C-78-32, at page 90 (August 5, 1983). The Court concluded that the process of "death-qualification" of prospective jurors was constitutionally infirm in two respects: a defendant is denied a trial by a jury representative of a cross-section of the community; and it creates juries that are conviction-prone.

In the present case, petitioner's trial counsel challenged "death-qualification" process on the identical grounds that the Court in *Grigsby* found to be unconstitutional. (T. 12-13). It had previously been held that the death qualification issues may not be considered unless raised before the trial in State court. *Hulsey v. Sargent*, 550 F.Supp. 179 (E.D. Ark. 1981). Following the Court's opinion in *Grigsby*, it issued an order granting the respondent's "Motion for Stay Pending Appeal," and further elaborated on the contemporaneous objection requirement. In order to properly raise the death qualification issue, a petitioner must have not only made a timely objection, but he must have also made an "offer to prove by evidence that death-qualified juries would not be representative or that they would be guilt prone." *Grigsby v. Mabry*, Case No. PB-C-78-32, fn. 3 page 3 (August 18, 1983) (Memorandum Opinion and Order). In the present case, only the objection was raised. Although the motion was considered by the trial court during a pretrial conference (T. 40-42), no offer of the type mentioned above was made by the defense. Petitioner has failed to properly raise the death qualification issue and is barred from raising it at this point. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *see also, Witherspoon v. Illinois*, 391 U.S. 510 (1968).

THEREFORE, the remaining issue raised in the petition will be dismissed and the relief sought will be denied.

DATED this 20 day of September, 1983.

/s/ William R. Overton
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

EUGENE ISAAC PITTS PETITIONER

V. CASE NO. PB-C-82-92

A. L. LOCKHART, Director
Arkansas Department of Correction RESPONDENT

JUDGMENT

Pursuant to the Memorandum and Order filed in this matter this date, it is Considered, Ordered and Adjudged that this case be, and it is hereby, dismissed; the relief sought is denied.

DATED this 20 day of September, 1983.

/s/ William R. Overton
United States District Judge

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

FILED
OCT 18 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCT 18 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 84-2026

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction . . . . . .Petitioner

V.

Eugene Issac Pitts . . . . . Respondent/Cross-Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas 72201
(501) 371-0808

BY: CHARLES T. COLEMAN

Attorney of Record and
Counsel for Respondent/
Cross-Petitioner

No. 84-2026

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction . . . . . .Petitioner

V.

Eugene Issac Pitts . . . . . Respondent/Cross-Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas 72201
(501) 371-0808

BY: CHARLES T. COLEMAN

Attorney of Record and
Counsel for Respondent/
Cross-Petitioner

No. 84-2026

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

A. L. Lockhart, Director, Arkansas
Department of Correction . . . . . .Petitioner

V.

Eugene Issac Pitts . . . . . Respondent/Cross-Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The petitioner, A. L. Lockhart, the Director of the Arkansas Department of Correction, has petitioned this Court for a review of the finding of the Eighth Circuit Court of Appeals that respondent's conviction was in violation of the United States Constitution. The opinion of the Eighth Circuit is reported at 752 F.2d 689 (8th Cir. 1985). The petition was filed on June 28, 1985. By letter of the clerk of this Court dated September 19, 1985, a response was requested.

The issue upon which the petitioner seeks review of the Eighth Circuit's ruling is the "death-qualified jury" issue left open by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968). No review of the Eighth Circuit's decision is necessary in this case because their conclusion is correct as a matter of federal constitutional law.

The Eighth Circuit's decision in this case was predicated upon the lead case of McCree v. Lockhart, styled Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985). In that decision the court acknowledged that there was a split in the circuits on this issue. This Court has recently granted a petition for a writ of certiorari to review the McCree case. For all of the reasons expressed by the district court in Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), and those expressed by the Eighth Circuit in Mabry v. Grigsby, 758 F.2d 226 (8th Cir. 1985), it is respectfully submitted that the fundamental constitutional requirements of a fair and impartial jury and cross-sectional representation require a summary affirmance of the Eighth Circuit's decision. No review is necessary. Nevertheless, acknowledging that this court has granted

certiorari in the lead case, respondant is aware that this court must ultimately determine the underlying issues involved.

Respectfully submitted,

WRIGHT, LINDSEY & JENNINGS
2200 Worthen Bank Building
Little Rock, Arkansas 72201
(501) 371-0808

By Charles T. Coleman
Charles T. Coleman
Attorney for Respondent/
Cross-Petitioner

1843T-1